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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

SEALED APPELLEE

Petitioner

versus

SEALED APPELLANT

Respondant

ON PETITION FOR WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SEALED APPELLEE
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51pp

QUESTIONS PRESENTED FOR REVIEW

INTRODUCTORY STATEMENT

Sealed Appellee was convicted of bribery and fraud, but the charges were based on a theory which was later reversed by the Supreme Court. The Court of Appeals overturned the conviction and found a miscarriage of justice. On remand, the District Court granted a writ of error coram nobis. Sealed Appellee moved for an expungement of records of the district court and of federal agencies related to his prosecution. The government opposed the motion only to the expungement of records other than the court itself. The District Court concluded that the weight of authority is that the court may order the expungement of the records at issue. The Court found exceptional circumstances, and the Court exercised its discretion, and ruled in favor of the petitioner, [Sealed Appellee]. It ordered the Clerk of Court to delete and expunge from all records of the Court any and all references to the Grand Jury Indictment, the arrest, the prosecution, and the conviction of petitioner, [Sealed Appellee], and it ordered the United States Attorney for the Eastern District of Louisiana to forward the order to any agency of which it is aware which may have such references in its records and for all such agencies to remove all such references from its records. The Government's motion for reconsideration was denied. The District Court observed that, "[Sealed Appellee] was indicted for actions that were not crimes. Though he stands unconvicted of any crime, the recorded facts of his arrest and the subsequent proceedings subject him, a former law enforcement official, to disabilities which he should not have to suffer. As the records regarding [Sealed-Appellee] are based on an inaccurate perception of the law," the

District Judge reasoned that, "there is no purpose for their maintenance and the maintenance of them is detrimental to [Sealed-Appellee]." The Sealed Appellant appealed the order commanding all executive branch agencies to expunge their records. The Fifth Circuit Court of Appeals held that the order of expungement of those records was an abuse of discretion. Expungement of the Court's records was not opposed and is not an issue before this Court.

QUESTIONS

1. Whether the Fifth Circuit Court of Appeals decision is in conflict with the reasoning of other circuits and the district court in failing to recognize that expungement is proper where, as in this case, the federal conviction has, in some manner, been invalidated. Cases the Fifth Circuit is in conflict with are *Bromley v. Crisp*, 561 F.2d 1351, 1364 (10th Cir. 1977); *United States v. Pinto*, 1F.3d 1069, 1070 (10th Cir. 1993); *United States v. Travers*, 514 F.2d 1171 (2nd Cir. 1974); *United States v. Friesen*, 853 F.2d 816, 817 (10th Cir. 1988); *Kowall v. United States*, 53 F.R.D. 211, 213 (W.D. Mich. 1971).

2. Whether the Fifth Circuit Court of Appeals is in conflict with the other circuits by placing a heavier burden of proof on the Sealed Appellee-Petitioner seeking expungement and by failing to properly apply the test of balancing the reasons advanced by the Sealed Appellee-Petitioner for expungement against the reasons advanced by the government for maintaining the records.

3. Whether the Fifth Circuit Court of Appeals applied reasoning in conflict with other circuits to erroneously conclude that the district court abused its discretion in entering an expungement order directed to the United States Attorney and compelling "any other agencies" to remove any and all references to the Grand Jury Indictment, the arrest, the prosecution, and the conviction of Sealed Appellee-Petitioner.

CERTIFICATE OF INTERESTED PARTIES

The undersigned Sealed Appellee-Petitioner certifies that the following persons have an interest in the outcome of this case.

1. Solicitor General of the United States, attorney for Sealed Appellant-Respondant, Washington, D.C.

2. Stephen A. Higginson, attorney for Sealed Appellant-Respondant, Assistant United States Attorney for the Eastern District of Louisiana, New Orleans, Louisiana.

3. Sealed Appellee-Petitioner, Kenner, Louisiana.

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The Sealed Appellee-Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in its proceeding on December 4, 1997.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals sought to be reviewed was entered on December 4, 1997, and it is reported at 130 F.3rd 695 (5th Cir. 1997), and appears at Appendix C. The opinion of the District Court for the Eastern District of Louisiana was signed on November 14, 1996, and it has not been reported. It appears at Appendix A. The minute entry denying reconsideration was signed January 8, 1997, and appears at Appendix B.

JURISDICTION

The jurisdiction of the United States District Court is pursuant to 28 U.S.C. Section 1651 and 28 U.S.C. Section 2255. The jurisdiction of the Fifth Circuit Court of Appeals is under 28 U.S.C. Section 1291 and the All Writs Act. Jurisdiction of the United States Supreme Court is pursuant to 28 U.S.C. Section 1254(1).

RULES AND STATUES INVOLVED

As provided by Supreme Court Rule 14(b) the verbatim quotations of the following statues and rules are set forth in appendix D.

1. Privacy Act of 1974

STATEMENT OF THE CASE

1. Course of Proceedings and Disposition in the Trial Court

On January 21, 1986, a six count superseding indictment was returned against Petitioner, [Sealed-Appellee], along with Junior Provenzano, Russell Camardelle, and Rodney Camardelle alleging criminal conspiracy, wire fraud, and interstate travel in aid of racketeering. Sealed Record on Appeal Vol.1, p.138. [Sealed Appellee] was charged in Count 1 with conspiracy to commit fraud and to use interstate commerce to commit public bribery; in Counts 2 through 4, with substantive acts of wire fraud; and in Counts 5 and 6, with substantive acts in aid of racketeering for the actual bribery. Record Excerpts Tab. 3, R-138-152.

On March 25, 1986, [Sealed Appellee] was found guilty on Counts 1 (conspiracy), 3 (wire fraud), and 4 (wire fraud), but acquitted on Counts 2 (wire fraud), 5 and 6 (relating to the substantive acts of bribery). The District Court sentenced [Sealed Appellee] to eighteen months imprisonment, a fine of $3,000.00, and gave him concurrent three year terms of probation on each count. Record Excerpts Tab. 4, R-867-871.

On May 7, 1986, [Sealed Appellee] filed a notice of appeal from the final judgment of conviction. On January 29, 1987, the Fifth Circuit Court of Appeals affirmed his conviction; *United States v. Bruno,* 809 F.2d 1097 (5th Cir.1987). Record Excerpts Tab. 7. On May 13, 1988, Sealed Appellee petitioned for habeas relief under 28 U.S.C. Section 2255 to vacate his convictions for wire fraud and conspiracy on the ground that those convictions had been invalidated by virtue of the Supreme Court's decision in *McNally v. United States,* 483 U.S. 350 (1987). R-575. On March 15, 1989, the district court denied Sealed Appellee's petition. R-514. On April 13, 1989, he filed a notice of appeal from that decision. R-507.

On June 19, 1990, the Fifth Circuit Court of Appeals reversed the

wire fraud convictions and invalidated and remanded the conspiracy conviction; *United States v. Bruno*, 903 F.2d 393 (5th Cir. 1990). Record Excerpts Tab.8. The conspiracy conviction was invalidated and remanded because the petitioner had already served his sentence for conspiracy, the only avenue of relief available to him was through a writ of error coram nobis, and the case was remanded for a determination of whether the petitioner suffers continuing disabilities required for coram nobis relief.

On August 9, 1990, [Sealed Appellee] petitioned the District Court for a writ of error coram nobis. R-960. On August 16, 1990, the district court found that [Sealed Appellee] was suffering continuing disabilities as a result of his conviction and granted his petition setting aside the judgment of conviction as to all counts. R-935-938.

On May 31, 1996, [Sealed Appellee] filed a petition for expunction of his record. R-777. On June 28, 1996, Sealed Appellant filed an answer in opposition to the petition. R-792. Sealed Appellee filed a supplemental memorandum in support of his motion for expungement. R-787. On November 14, 1996, the district court granted Sealed Appellee's petition and ordered the Clerk of Court to delete and expunge from its records any and all references to Sealed Appellee's indictment, arrest, prosecution and conviction. Order and Reasons, *United States v. Bruno*, Cr. No. 85-451-"J" (Nov. 14, 1996). The United States Attorney for the Eastern District of Louisiana was ordered to forward the expungement order to all other agencies having references in their records or records under their control, and to delete and expunge all such references of Sealed Appellee's indictment, arrest, prosecution, and conviction. Record Excerpts Tab. 5, R-782-786, appendix A-1. On December 10, 1996, the Sealed Appellant filed a motion with the district court to reconsider its order. R-774. On January 6, 1997, the District Court denied the motion. Record Excerpts Tab 5, R-767, Appendix A-2. On February 4, 1997, the Sealed Appellant filed its notice of appeal. R-766.

On December 4, 1997, the Fifth Circuit Court of Appeals reversed the District Court's order to expunge the records of the executive branch of government, Appendix C. The Sealed Appellee now files this Petition for Writ of Certiorari.

2. Statement of Facts

Sealed Appellee, who was an official of the Orleans Parish Criminal Sheriff's Office, together with the co-defendants, Russell Camardelle, Rodney Camardelle, and Junior Provenzano, were charged in an indictment with involvement in a plan by which Sealed Appellee was to bribe a state court judge assigned to try Chip Langford. Sealed Appellee made no attempt to bribe Judge Augustine nor did Judge Augustine discuss the case with, or solicit, accept, or receive anything of value from any of the defendants to "fix" Chip Langford's case. Record Excerpts Tab 3, R-138-152.

Bobby Langford, the father of Chip, had allegedly contacted Provenzano and asked him to help secure the release of his son, Chip. Provenzano contacted John Toal, an unindicted co-conspirator, who stated that he would help free Chip but it would be expensive. They also enlisted the help of Russell Camardelle, who was a prison guard and who participated with his brother, Rodney Camardelle. Toal agreed with Provenzano to charge Bobby Langford approximately $30,000.00 to bribe the necessary officials. Toal promised Langford that, with the help of Sealed Appellee, Langford could visit his son Chip in jail. Sealed Appellee met with Toal, Bobby Langford, and an attorney employed by Langford. The attorney wanted to arrange bail for Chip, but Sealed Appellee-Petitioner and Toal advised the attorney that a bond could not be worked out because Chip and his parents were "carnival people" and it was believed that Chip might jump bail; *United States v. Bruno*, 809 F.2d 1097 (5th Cir. 1987).

Sealed Appellee was found guilty of conspiracy and wire fraud. He filed an appeal with this Court arguing that his conspiracy conviction should be set aside because of a variance between the indictment and the evidence developed at trial. This Court concluded that a variance existed but that it was not prejudicial. This Court stated that the evidence established at trial "was more than sufficient to support a finding that Sealed Appellee and Camardelle were guilty of conspiring to bribe." *United States v. Bruno*, 809 F.2d 1097, 1104 (5th Cir. 1987). Based on *McNally*, Sealed Appellee filed a motion to vacate judgment which the District Court denied. Sealed Appellee then appealed to the United States Fifth Circuit Court of Appeals for relief; *United States v. Bruno*, 903 F.2d 393 (5th Cir. 1990). The Fifth Circuit Court of Appeals reversed the wire fraud convictions and invalidated and remanded the conspiracy conviction. The conspiracy conviction was invalidated by the Fifth Circuit when it determined that, "Such a conviction would constitute a 'complete miscarriage of justice' such as is required for coram nobis relief." Tab. 8, R-886. "Regarding the other requirement for coram nobis relief, that the petitioner is suffering civil disabilities as a consequence of the criminal conviction, ..." R-886. "Because the petitioner has already served his sentence for conspiracy, the only avenue of relief available to him was through a writ of error coram nobis. We REMAND this case for a determination of whether the petitioner suffers the continuing disabilities required for corm nobis relief." Tab. 8, R-886. "In upholding the conspiracy conviction on direct appeal, this court was able to assume that the jury did not base its conspiracy conviction on conspiracy to defraud the Langfords because there was insufficient evidence of that conspiracy. This court was, therefore, able to assume that the conspiracy conviction was based on the bribery-through-interstate-commerce charge. The issue in the instant case is different. We cannot assume that the jury did not base its conspiracy conviction on conspiracy to commit the intangible-rights version on wire fraud. There was sufficient evidence of that

form of conspiracy, and the jury may have convicted on that basis." Tab. 8, R-885.

Sealed Appellee always denied that he was a member of a conspiracy. Defendant, Provenzano, acknowledged that there was a conspiracy between himself and Toal, but he denied that Sealed Appellee was a part of the conspiracy. Sealed Appellee experienced ethical difficulties with his attorney. He filed a pro so brief alleging that he was entitled to a new trial based on newly discovered evidence, that there was insufficient evidence to support the Grand Jury Indictment, and that he was the victim of vindictive prosecution; United States v. Bruno, 809 F.2d 1097 (5th Cir. 1987) fn. 2 and 3. Sealed Appellee filed a law suit against his attorney, Edward J. Castaing, Jr.; he alleged damages resulting from Castaing's unethical representation. The court dismissed the case after finding that prescription had run; Court of Appeals, Fourth Circuit, State of Louisiana, Bruno v. Castaing, Jr., No. 93-CA-2162 (case not reported).

REASONS THE WRIT OF CERTIORARI SHOULD BE GRANTED

1. The Decision of the Fifth Circuit is in Conflict with other Circuits and the District Court.

On the federal level, Congress has not provided a general expungement statute. However, the federal courts have not seen this as an obstacle to the exercise of their authority. They have found other bases upon which to grant relief. Courts have occasionally noted that their authority for granting expungement has a constitutional basis. Federal courts have most frequently based their decisions on their inherent equity power. The Courts view this common law power as providing authority to establish a remedy when necessary and appropriate to preserve basic legal rights. Other decisions have been grounded on statutes, though not specifically providing for expungement, that have been interpreted by the courts to afford such relief. These include the Privacy Act of 1974, the Civil Rights Act, and the Youth Corrections Act. See Diehm, *Federal Expungement: A Concept in Need of a Definition*, 66 St. John's L. Rev. 73, 80-81. (Winter 1992) No.1 and the cases cited therein. The United States Supreme Court has not spoken on the right of the Courts to order expungement of agency records. Decisions are made on a case by case basis and conflicts of decisions occur.

The decision of the Fifth Circuit Court of Appeals reversing the District Court in this case is in conflict with the other circuits in failing to recognize that expungement is proper where, the federal conviction has, in some manner, been invalidated. The Fifth Circuit failed to distinguish the large difference between expunging the arrest record of a presumably innocent person and expunging the conviction of a person adjudged as guilty in a court of law.

As was stated in *United States v. Pinto,* 1F.3d 1069, 1070 (10th Cir. 1993), the case law does support the notion that when a conviction is somehow invalidated, such as by a finding that it was unconstitutional, illegal, or obtained through government misconduct, a federal court may, in appropriate cases, grant expungement. In *United States v. Travers,* 514 F.2d 1171 (2nd Cir. 1974), expungement was granted after the Supreme Court rejected the statutory interpretation under which the conviction was affirmed. The court concluded that the defendant's activities simply were not illegal. This was recognized as an extreme case in which expungement should be granted. This is exactly the situation in Sealed Appellee's case now before the Court.

Federal Court may, in extreme cases, expunge a federal conviction that has, in some manner, been invalidated. See *Bromley v. Crisp,* 561 F.2d 1351, 1364 (10th Cir. 1977); *United States v. Travers,* 514 F.2d 1171 (2nd Cir. 1974); *United States v. Friesen,* 853 F.2d 816, 817 (10th Cir. 1988); *United States v. Pinto,* 1 F.3d 1069, 1070 (10th Cir. 1993); *Kowall v. United States,* 53 F.R.D. 211, 213 (W.D. Mich. 1971).

The reasoning of the Fifth Circuit in this case fails to recognize that Sealed Appellee's conviction was for an act that was not a crime. This puts it in conflict with the above cited cases and the reasoning of the District Judge in this case. The Fifth Circuit cites to support its position cases in which the convictions were not invalid but were merely overturned on other grounds. In *Rodgers v. Slaughter,* 469 F.2d 1084 (5th Cir. 1972) the defendant clearly violated state law, but he was not advised of his right to counsel. In *United States v. Scott,* 793 F.2d 117 (5th Cir. 1986), the conviction was for a valid crime but the defendant complained that her past convictions interfered with her job as a securities dealer. In *United States v. Friesen,* 853 F.2d 816 (10th Cir. 1988), a jury acquitted the

defendant of conspiracy to manufacture and distribute cocaine in violation of federal law. He was merely acquitted of a valid crime.

In the case here before the Court, the District Court correctly recognized the distinction from *Rogers* and *Scott.* The court observed that, "more than being presumed innocent or found innocent of a valid crime, [Sealed Appellee] was charged with and convicted of crimes which did not exist." This is an exceptional circumstance for which expungement of the executive branch records should be granted.

The privilege to expunge is one of exceedingly narrow scope, that is, the basis for expungement is narrow, but not the courts' authority. The District Court was correct in finding existence of such exceptional circumstances in this case. "[Sealed Appellee] was arrested, but he in effect has never been charged with a crime. The acts he was charged with committing were not crimes. Though he stands unconvicted of any crime, the recorded facts of his arrest and the subsequent proceedings subject [Sealed Appellee], a former law enforcement official, to disabilities which he should not have to suffer. The [Sealed Appellant] has shown no out-weighing interest in maintaining its records which are themselves based on an invalid application of the law." Tab. 5, R.-785. The District Court was correct in granting the order of expungement and it is not overbroad. The decision of the Fifth Circuit Court of Appeals is in conflict with expungement cases in the other circuits, and relies upon the majority opinion in *United States v. Janik,* 10 F.3rd 470 (7th Cir. 1993) which has not been followed by the other circuits.

2. Petitioner Has Standing as was held in the 10th and D.C. Circuits and the W.D. of Michigan.

The Fifth Circuit Court of Appeals has raised petitioner's right to the remedy of expungement based on an alleged lack of standing. The Court states that petitioner must show an affirmative rights violation by the executive branch officers or agencies to justify the intrusion into the executive's affairs.

The alleged rights violation is clear from the record. Petitioner has a right to privacy guaranteed by the Fourth Amendment to the Constitution of the United States and the Privacy Act of 1974. A stigma flows from the criminal record showing arrest, indictment, and conviction for an act determined not to be a crime. This has created a false criminal record. The Government seeks to maintain that false criminal record for use in future law enforcement by the government's own admission. This is a detriment to Sealed Appellee and an invasion of his right to privacy. Only by expungement can his slate be wiped clean, and the stigma of the false criminal record be removed.

The guarantee of due process in the Fifth Amendment to the Constitution was violated when petitioner was arrested, indicted, and convicted of an action which was not a crime. This creates the exceptional circumstance, not present with a mere acquittal. This gives rise to the power of the court to use its discretion to order expungement of the false information the Government seeks to maintain in its files, and by the government's own admission in its pleadings, it intends to use adversely to Sealed Appellee. For these reasons, expungement is justified and requested.

The proper procedure for petitioning for expungement is discussed in *United States v. Linn*, 513 F.2d 925, 926-927 (10th Cir.

1975). Such requests to expunge are frequently made as a part of the relief requested in civil rights proceedings against state or county officials. See *United States v. McLeod*, 385 F.2d 734 (5th Cir. 1967). They have frequently been made in post-conviction proceedings. See *Rogers v. Slaughter*, 489 F.2d 1084 (5th Cir. 1973) and *Kowall v. United States*, 53 F.R.D. 211 (W.D. Mich. 1971). Actions have been brought directly against the custodian of the records sought to be expunged; *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974). Requests have been made in the criminal proceeding in which the arrestee was prosecuted. See *United States v. Linn*, 513 F.2d 925, 926-927 (10th Cir. 1975).

3. The Fifth Circuit Court of Appeals Was In Error and In Conflict with the 2nd, 9th, 10th and D.C. Circuits and the W.D of Michigan in Finding An Abuse of Discretion by the District Court.

A. The District Court had Jurisdiction to Order the Executive Branch to Expunge Records Relating to Criminal Mater

The District Court correctly determined that it had authority to order expungement of the records of Sealed Appellee. The Sealed Appellant cited only one case to the contrary, *United States v. Janik*, 10 F.3d 470 (7th Cir. 1993), upon which the Fifth Circuit relies heavily, and is in conflict with other circuits. A staggering majority of cases have not followed the reasoning in *Janik*, but instead followed Judge Cudahy's dissent in *Janik*. He concurred in the denial of expungement based on the facts, but he dissented as to the jurisdiction of the court's authority to order expungement. He reasoned that *Diamond v. United States*, 649 F.2d 496 (7th Cir. 1981) supports the exercise of jurisdiction establishing a case-by-case balancing approach, whereby, if the dangers of unwarranted adverse conse-

quences to the individual outweigh the public interest in maintenance of the records, then expunction is appropriate. He further reasoned that the relation of the federal courts to law enforcement agencies is so close as to validate, as a practical matter, judicial surveillance of closely related agency files. Agency files essentially record events transpiring in the courts, with respect to which courts have a continuing interest. He concluded that practical considerations should be of sufficient weight to override any theoretical separation of powers objections, and he cited strong support in the case law for that position. According to his opinion, the separation of powers approach unnecessarily ties the courts' hands.

B. Extreme and Exceptional Circumstances Exist to Warrant Issuance of the Expungement Order in this Case.

Specific statutory provisions granting a right to expungement are not present in this case. Therefore authority to order expungement must stem from the inherent equitable power of the court. After dismissal of the charges or acquittal in extreme circumstances, an arrest record may be ordered expunged. See *United States v. Pinto*, 1 F.3d 1069 (10th Cir. 1993) and *United States v. Friesen*, 853 F.2d 816, 817 (10th Cir. 1988). The Courts, in these cases, observed that there is a large difference between expungement of the arrest record of a presumably innocent person, and expungement of the conviction of a person adjudged guilty in a court of law. The case law does support the notion that when a conviction is somehow invalidated, such as by a finding that it was unconstitutionally obtained through government misconduct, a federal court may, in appropriate cases grant expungement. Federal Courts have the power to order expungement of a conviction on habeas corpus review. *See Bromley v. Crisp*, 561 F.2d 1351, 1364 (10th Cir. 1977) and *United States v. Smith*, 940 F. 2d 395, 396 (9th Cir. 1991).

In *United States v. Travers,* 514 F.2d 1171 (2nd Cir. 1974) the Court granted expungement of a federal conviction after the Supreme Court rejected statutory interpretation under which the conviction was affirmed, and the Court concluded that the defendant's actions simply were not illegal. This was found to be such an extreme case that warranted the exercise of the court's equitable power to grant expungement of the records. This is analogous to what has occurred in the case of Sealed Appellee.

It was observed in *United States v. Linn,* 513 F.2d 925 (10th Cir. 1973), that it is fairly well established that Courts do have power to expunge an arrest record where an arrestee has been acquitted. However, there appears to be no definitive all purpose rule to govern requests of this nature, and to a considerable degree each case must stand on its own. The power to expunge is a narrow one, and it should not be routinely used whenever a criminal prosecution ends in an acquittal, but it should be reserved for the unusual or extreme case. Cases call for a balancing between the government's need to maintain extensive records in order to aid in general law enforcement and the individual's right of privacy.

In *United States v. Linn,* 513 F.2d 925 (10th Cir. 1973), the Court enumerated circumstances found in case law justifying the order of expungement. These were where the arrest itself was an unlawful one, or the arrest represented harassing action by the police, or where the statute under which the arrestee was prosecuted was itself unconstitutional. An acquittal, standing alone, was determined not to be in itself sufficient to warrant an expungement of an arrest record.

In the case of *Linn,* his arrest was a lawful one, pursuant to an indictment returned by a duly constituted grand jury. The charges in the indictment were lawful ones and not subject to any constitutional infirmity. In acquitting, the jury found, in effect, only that the

Government had not proved Linn guilty beyond a reasonable doubt. There was no showing that the retained records have been, or will be improperly or intrusively used against him. Therefore, the Court did not find a demonstration of an invasion of privacy which overrides the government's justification for keeping the records.

In *United States v. Friesen*, 853 F.2d 816 (10th Cir. 1988), the government contended that the court's power to expunge arrest records is "exceedingly narrow" and to be applied only in the most unusual of circumstances. Such circumstance cited by the Government was an arrest based on a statute held unconstitutional citing *Kowall v. United States*, 53 F.R.D. 211 (W.D. Mich. 1971). The Government, in that case, stated that the petitioner seeking expungement must show harm in extreme circumstances. The Court reasoned in *Friesen* that the District Court has the authority to order expungement but that the power is not unfettered. Expungement is committed to the trial court's discretion, but it is not a remedy to be granted frequently. Mere acquittal of the subsequent charge has been held an insufficient reason for ordering expungement. Such a remedy should be reserved for the unusual or extreme case.

In *Friesen* the District Court record did not show a factual basis for the petitioner's allegation that his arrest resulted in a stigma that acquittal would not absolve. The case was remanded for establishment of the facts in an adverse proceeding as the appellate court could not determine the district court's abuse of discretion without establishment of such facts.

In *Doe v. Webster*, 606 F.2d 1226, 1233, 1238 (App. D.C. 1979), the expungement was based on the statutory provisions of the Youth Corrections Act. In that case, the court reviewed the legislative history of that Act. The primary concern in passing the Act was that

the rehabilitated youthful offender be spared the far more common and pervasive social stigma and loss of economic opportunity that accompany the "ex-con label." The drafters intended to give youthful ex-offenders a fresh start, free from the stain of a criminal conviction, and an opportunity to clean their slates to afford them a second chance in terms of both jobs and standing in the community. A brief review of that history amply demonstrates this point. They observed that promise of expungement is an important one. The stigma of a criminal conviction may itself be a greater handicap, in later life, than an entire misspent youth.

In *Doe v. Webster*, 606 F.2d 1226, 1233, 1238 (App. D.C. 1979), the court found unrealistic the government's assumption that youth offenders can be made sufficiently whole, by a simple notation in the official records, that the conviction has been set aside, and with issuance of a certificate to that effect. The Court noted that it was unrealistic thirty years ago and more unrealistic today. Modern technology has made it possible for computerized information and retrieval to be used by potential employers. Irrespective of notations and certificates, unless the slate is wiped clean in such a way that the F.B.I. will not disclose, and the youthful ex-offender may legally deny the set aside conviction, he will almost inevitably and forever bear its stigma in terms of both social relationships and economic opportunities.

To reiterate, the case of Sealed Appellee-Petitioner is distinguishable from *Rogers* and *Scott*. "More than being presumed innocent or found innocent of a valid crime, [Sealed Appellee] was charged with and convicted of crimes which did not exist." R-783. "The only criminal record of Sealed Appellee is the record he now seeks to have expunged." In deciding whether extreme or exceptional circumstances exist, "the court must weigh the harm to the individual from the records sought to be expunged against the interest the

Sealed Appellant has in maintaining those records." The Sealed Appellant admits that records have been correctly ordered expunged where the facts involved lacked probable cause coupled with special circumstances, where flagrant violations of the Constitution were present, or contained other unusual and extraordinary circumstances. Mass arrests for the sole purpose of harassing civil rights workers has been cited as such a circumstance. R-774-776.

C. Adverse Consequences to Sealed Appellee-Petitioner Outweigh any Interests of the Sealed Appellant in Maintaining Such Records

In deciding this matter, the court must weigh that harm to Sealed Appellee from the records he seeks to have expunged against the interests of the Sealed Appellant in maintaining those records. See *United States v. Schnitzer*, 567 F.2d 536 (2d Cir. 1977), cert. denied, 435 U.S. 907. The District Court in the instant case correctly found that Sealed Appellee is suffering and will suffer adverse consequences from the maintenance of the records which he seeks to have expunged. The court earlier found in the error coram nobis proceeding that Sealed Appellee was suffering disabilities from the invalid conviction itself; Sealed Appellant did not contest that finding. Beyond the arrest, even if the defendant ultimately prevails, it may subject him to serious difficulties. In *Menard v. Mitchell*, 430 F.2d 486, 490-492 (D.C.Cir. 1970), the court discusses these difficulties at length. The District Court agreed with *United States v. Bohr*, 406 F. Supp. 1218 (E.D. Wis. 1976) that indictment and arrest records are a source of embarrassment and misunderstanding and a slur on the defendant's reputation and character.

As the District Court observed, "The interests asserted by the [Sealed Appellant] are related to the possibility that the records may

be used or shared in further matters regarding [Sealed Appellee] or his involvement in the facts of this case. That is a very reason for the expungement. The records regarding [Sealed Appellee], are based on an inaccurate perception of the law, there is no reason for their maintenance; and the maintenance of them is detrimental to him." Tab. 6, R-767

Since there was no crime, the maintenance of these records could not serve as an aid to general law enforcement purposes. Sealed Appellee has no other criminal record. The Sealed Appellant's interest in maintaining such records as an intelligence base for further investigations may well lead to future harassment of Sealed Appellee. There is clearly no merit in the Sealed Appellant's contention that retention and preservation of the records promotes effective law enforcement and meets the "compelling public need for effective and workable criminal identification procedure." Sealed Appellant stated its interest is acquiring, preserving, and exchanging records with federal, state, and local law enforcement agencies, and it points out that Congress ordered the Attorney General to "acquire, collect, classify, and preserve all records pertaining to a crime" in 28 U.S.C. Section 534(a)(1982). Since there was no crime committed by Sealed Appellee-Petitioner, there is no valid reason for the Sealed Appellant to preserve a false criminal record. It would be difficult if not impossible, for Sealed Appellee to determine the extent to which his records are exchanged.

Use of the record of the Sealed Appellee for the purposes stated by the Sealed Appellant will surely result in adverse effects on the Sealed Appellee: embarrassment, slur on his character and reputation, probable harassment by law enforcement agencies, disabilities in obtaining employment, or seeking public office. The only criminal record of Sealed Appellee is this record which he seeks to have expunged. Tab. 5 R-782; Tab. 6 R-767.

D. The Expungement Order is Correct and it is Not Overbroad

The order of expungement reads in pertinent part as follows:

"IT IS ORDERED that the Clerk of Court is to delete and expunge from all records of this Court any and all references to the Grand Jury Indictment, the arrest, the prosecution, and the conviction of defendant, [Sealed Appellee-Petitioner], in this matter; and

IT IS ORDERED that the office of the United States Attorney for the Eastern District of Louisiana shall forward this order to any other agencies of which it is aware which may have such references in its records; and

IT IS ORDERED that such other agency or agencies shall remove all such references from its records."

The Sealed Appellant admits that it did not object to expungement of the court records, and now admits that only if this were plain error would this court find error. Federal Rules of Criminal Procedure 52(b) provides that "Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Plain error is clearly not present in this case before the court.

The Sealed Appellant argues that this order is overbroad and that the privilege to expunge a public record is one of exceedingly narrow scope. It cites *Rogers v. Slaughter,* 469 F.2d 1084 (5th Cir. 1972) to support its position. In that case, the narrow scope referred to the basis for expungement as discussed above, and not the content of the order. Unlike the facts in the instant case, the facts in Rogers did not support expungement.

In *United States v. Janik,* 10 F.3d 470, 473 (7th Cir. 1994), Judge Cudahy's dissenting opinion correctly reasoned that the relation of the federal courts to law enforcement agencies is so close as to validate as a practical matter judicial surveillance of closely related agency files. He noted that agency files essentially record events transpiring in the courts, with respect to which courts have a continuing interest. He correctly concluded that practical considerations should be of sufficient weight to override any theoretical separation of powers objections, and he cited strong support in the case law for that position. The separation of powers approach would unnecessarily tie the courts' hands. The majority of the circuits have followed the dissenting opinion in *Janik.*

In *United States v. Jennings,* 960 F.2d 1488,1490-91 (4th Cir. 1992), the court reiterated that the Assistant United States Attorney prosecuting a case is responsible for compliance with the dictates of *Brady v. Maryland,* 373 U.S. 83 (1996). This personal responsibility cannot be evaded by claiming lack of control over the files or procedures of other executive branch agencies.

In *Martinez v. Wainwright,* 621 F.2d 184, 186 (5th Cir. 1980), the prosecutor was responsible for production of the victim's rap sheet even if it was in the possession of another government agency. The court stated three circumstances when exercise of supervising power is appropriate as follows: (1) where remedy for a violation of a recognized statutory, procedural, or constitutional right is required; (2) where judicial integrity must be preserved by ensuring that a conviction rests on appropriate considerations validly before a jury; and (3) where the court seeks to deter future illegal Government conduct.

If a person found guilty of an offense under Section 404 of the Controlled Substances Act (21 U.S.C. Section 844) is subject to disposition under subsection (a) and the person is less than twenty-one years old at the time of the offense, the court shall enter an expunge-

ment order when applied for by such person. In 18 U.S.C. Section 3607(c) is set forth what the order is to encompass. There is to be expunged from all official records, except nonpublic records referred to in subsection (4), all references to his arrest for the offense, the institution of criminal proceedings against him, and the results thereof. The effect of the order shall be to restore such person, in the contemplation of the law, to the status he occupied before such arrest or institution of criminal proceedings.

The order of the District Court granting expungement of the Sealed Appellee-Petitioner's criminal record is correct and not overbroad. It is in conformity with the law discussed above. The opinion of the Fifth Circuit of Appeals in this case is in conflict with the other circuits as discussed above. The reasoning of the District Court follows the reasoning of the courts in other circuits. For the above reasons, Sealed Appellee-Petitioner requests that his Petition for a Writ of Certiorari be granted.

Sealed Appellee-Petitioner filed this action pro se and he asks that the Court liberally construe his papers; *United States v. Pinto,* 1 F.3d 1069 (10th Cir.1993).

CONCLUSION

For the foregoing reasons, the Sealed Appellee-Petitioner respectfully requests that this Court grant his Petition For Writ of Certiorari and that the District Court's order of expungement of "any and all references to the Grand Jury Indictment, the arrest, the prosecution, and the conviction of the defendant, [Sealed Appellee-Petitioner] ..." be affirmed and the decision of the Fifth Circuit Court of Appeals reversing the order of expungement by the District Court be reversed.

RESPECTFULLY SUBMITTED,

"S/Sealed Appellee"

Sealed Appellee-Petitioner pro se
729 Champagne Drive
Kenner, Louisiana, 70065
Telephone: 504-469-8683

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
NOV. 14 4:41 PM '96
LORETTA G. WHITE
CLERK

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	CRIMINAL ACTION
versus	NO. 85-451
VINCENT BRUNO	SECTION "J"

ORDER AND REASONS

Defendant Bruno moves for expungement of records.

Very briefly, Bruno was convicted of bribery and fraud, but the charges were based on a legal theory which was later rejected by the Supreme Court.[1] The Court of Appeals overturned the convictions and found a miscarriage of justice. On remand, this Court granted a writ of error coram nobis. Bruno now moves for expungement of the records of this Court and of other government agencies related to his arrest and prosecution.

The government opposes the motion only as to the expungement of the records of agencies other than the Court itself. The weight of authority is that the Court may order the expungement of the records at issue. While the Fifth Circuit has questioned in dictum whether the constitutional separation of powers would permit a district court to order expungement of the records of the executive branch. it has not addressed the question. *United States v. Scott*, 793 F.2d 117, 118 (5th Cir.1986). Most federal courts to address the issue have found that the

[1] For details of the facts and the law, see *United States v. Bruno*, 809 F.2d 1097 (5th Cir.), cert. denied, 481 U.S. 1067, 107 S.Ct. 2198 (1987); and *United States v. Bruno*, 903 F.2d. 393 (5th Cir.1990).

DATE OF ENTRY NOV. 15 1996

district court has such an equitable power. See United States v. Janik, 10 F.3d 470 (7th Cir.1993) (dissent, collecting cases). (Janik is the only case to find that courts have no such authority because of the separation of powers.) See, also, *Morrow v. District of Columbia,* 417 F.2d 728 (D.C.Cir.1969)

Decisions on expungement are within the discretion of the Court, *United States v. International Harvester Company,* 720 F.2d 41B, 419 (5th Cir.1983); but that discretion has an "exceedingly narrow scope" and expungement must be supported by "exceptional circumstances." *Carter v. Hardy,* 543 F.2d 555 (5th Cir.1976). Pursuant to Fifth Circuit precedent, the Court may not order expungement of records if the facts show a violation of the charged crime, but the conviction was overturned on constitutional grounds. Rogers v. Slaughter, 469 F.2d 1084 (5th Cir.1972) (defendant clearly violated state law, but he was not advised of his right to counsel). The Court may not order expungement of arrest records where a conviction was validly obtained. *United States v. Scott,* 793 F.2d 117 (5th Cir.1986)[2]

Another circuit would permit the expungement of arrest records on an acquittal, on the showing of exceptional circumstances, even if there was enough evidence to go to the jury on a valid crime. *United States v. Pinto,* 1 F.3d 1069 (10th Cir.1993)

This case is distinguishable from *Rogers* and *Scott.* More than being presumed innocent or found innocent of a valid crime, Bruno was charged with and convicted of crimes which did not exist.

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[2] The Fifth Circuit ordered expungement of state arrest and conviction records where state officials used the arrests and charges to illegally harass and coerce defendants, who were involved in voter registratio drives, even though the defendants may have committed the minor crimes at issue. *United States v. McLeod,* 385 F.2d 734 (5th Cir.1967). Those facts are too far afield to offer guidance here.

In deciding this matter, the Court must weigh the harm to Bruno from the records he seeks to have expunged against the interests of the government in maintaining those records. See *United States v. Briggs,* 514 F.2d 794, 804 (5th Cir.1975); *United States v. Schnitzer,* 567 F.2d 536 (2d Cir. 1977), cert. denied, 435 U.S. 907, 98 S.Ct. 1456.

Bruno is suffering and will suffer adverse consequences from the maintenance ot the records which he seeks to have expunged. The Court earlier found that Bruno was suffering disabilities from the invalid conviction itself, and the government did not contest that finding. Beyond the conviction, the record of an arrest, even if the defendant ultimately prevails, may subject him to serious difficulties. In the much-cited *Menard v. Mitchell,* 430 F.2d 486, 490-492 (D.C.Cir.l970), the court discussed the difficulties at length. The Court agrees with *United States v. Bohr,* 406 F.Supp. 1218 (E.D.Wis.1976), that indictment and arrest records are a source of embarrassment and misunderstanding and a slur on the defendant's reputation and character.

As to its interest, the government has asserted only its statutory duty to maintain the records at issue. 28 U.S.C. ß 534. The duty of the government under that statute is subject to the balancing requirement. Schnitzer, 567 F.2d at 539. Other than the statutory obligation, the government has not suggested any actual public or law enforcement interest in maintaining the records of the matter. These record-keeping interests are not of sufficient weight to countervail the right of Bruno to be relieved of the adverse consequences of the maintenance of the records. See *Kowall v. United States,* 53 F.R.D. 211, 216 (W.D.Mich.1971), in which the court noted that the difficulties of the defendant caused by the considerations set out in Menard, supra, "will justify expunging a record where circumstances indicate such action is appropriate to accord full judicial relief, and where there is no apparent countervailing legitimate investigatory need for the data."

There are exceptional circumstances which lead the Court to exercise its discretion in favor of the defendant. Bruno was arrested, but in effect has never been charged with a crime. The acts he was charged with committing were not crimes. Though he stands unconvicted of any crime, the recorded facts of his arrest and the subsequent proceedings subject Bruno, a former law enforcement official, to disabilities which he should not have to suffer. The government has shown no out-weighing interest in maintaining its records, which are themselves based on an invalid application of the law. The motion for expungement is **GRANTED.**

IT IS ORDERED that the Clerk of Court is to delete and expunge from all records of this Court any and all references to the Grand jury indictment, the arrest, the prosecution and the conviction of defendant, Vincent Bruno, in this matter; and

IT IS ORDERED that the office of the United states Attorney for the Eastern District Louisiana shall forward this order to any other agencies of which it is aware which may have such referencesin its records; and

IT IS ORDERED that such other agency or agencies shall remove all such references from its records.

New Orleans, Louisiana, this 14 day of November, 1996.

"S/Patrick E. Carr"

United States District Judge

A-5

APPENDIX B

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF LA
JAN. 8 1:35 PM '97
LORETTA G. WHITE
CLERK

MINUTE ENTRY
CARR, J.
JANUARY 6, 1997

UNITED STATES OF AMERICA — CIVIL ACTION

versus — No. 85-451

VINCENT BRUNO — SECTION "J"

The government moves for reconsideration of an earlier ruling of the court which ordered the expungement of all records related to the defendant. The Court will not restate the facts or analysis of the matter which are set out in the earlier order. The motion is **DENIED.**

As to the law and the facts of the case, the government has presented nothing which was not considered by the court in the earlier disposition.

The government now suggests that it has several general interests in maintaining its records, which outweigh the interest of Bruno in the expungement. The interests asserted by the government are related to the possibility that the records may be used or shared in further matters regarding Bruno or his involvement in the facts of this case. That is the reason for the expungement. As the records regarding Bruno are based on an inaccurate perception of the law, there is no reason for their maintenance; and the maintenance of them is detrimental him.

DATE OF ENTRY JAN. 3, 1997

APPENDIX C

U.S. COURT OF APPEALS
FILED
DEC. 04 1997
CHARLES R. FULBRUGE, III
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 97-30160

SEALED APPELLANT,

Plaintiff-Appellant,

VERSUS

SEALED APPELLEE,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before REYNALDO G. GARZA, SMITH, and WIENER, Circuit Judges.
JERRY E. SMITH, Circuit Judge:

The United States appeals an order commanding all executive branch agencies to expunge the records of a particular defendant's overturned convictions. We reverse.

I.

In 1986, the defendant (designated in the caption as "Sealed Appellee") was convicted of wire fraud and conspiracy, and we affirmed. Before the appeal became final, however, the Supreme Court decided *McNally v. United States*, 483 U.S. 350 (1987), which foreclosed one avenue for obtaining a wire fraud conviction. *See McNally*, 483 U.S. at 359-61. Because the jury instructions had not excluded the possibility that the fact-finder could have found the defendant guilty of both conspiracy and wire fraud under the now- prohibited theory, we set aside the conviction in a subsequent action brought under 28 U.S.C. ß 2255.[1]

Six years later, the defendant returned to the court of conviction and filed a petition for "expunction" of the records of his now-overturned convictions. Citing interference with his professional law-enforcement activities, he prayed for an order expunging all the federal judicial records of the conviction and forcing all executive branch agencies having a record of the charges to do the same.

The district court granted the request, reasoning that it had jurisdiction to enter an expungement order against the executive branch:

> While the Fifth Circuit has questioned in dictum whether the constitutional separation of powers would permit a district court to order expungement of the records of the executive branch, it has not addressed the question. *United States v. Scott*, 793 F.2d 117, 118 (5th Cir. 1986). Most federal courts

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[1] In the second appeal, we concluded that because the defendant had already served his sentence, a habeas corpus action was inappropriate. Instead, we remanded to district court for a write of *coram nobis* proceeding.

> to address the issue have found that the district court has such equitable power. *See United States v. Janik,* 10 F.3d 470 (7th Cir. 1993) (dissent, collecting cases) (*Janik* is the only case to find that courts have no such authority because of the separation of powers.).

On the merits, the court held:

> Pursuant to Fifth Circuit precedent, the Court may not order expungement of records if the facts show a violation of the charged crime, but the conviction was overturned on constitutional grounds. *Rogers v. Slaughter,* 469 F.2d 1084 (5th Cir. 1972) (defendant clearly violated state law, but he was not advised of his right to counsel). The Court may not order expungement of arrest records where a conviction was validly obtained. *United States v. Scott,* 793 F.2d 117 (5th Cir. 1986).

The court distinguished these precedents, stating: "More than being presumed innocent or found innocent of a valid crime, [defendant] was charged with and convicted of crimes which did not exist." Id. Thus, the court entered an order compelling all federal agencies with a record of the conviction to expunge their records.

The government now appeals, arguing that federal courts lack jurisdiction to enter expungement orders against executive branch actors. In the alternative, the government maintains that the defendant failed to make the showing needed to obtain expungement.

II.

We review jurisdictional issues *de novo. See, e.g., Robinson v. TCI/US West Communications, Inc.,* 117 F.3d 900, 904 (5th Cir. 1997). Challenges to subject matter jurisdiction can be raised at any time and *sua sponte* by the court. *See, e.g., Johnston v. United States,* 85 F.3d 217, 218 n.2 (5th Cir. 1996).

We review the decision to grant expungement for an abuse of discretion. *See United States v. International Harvester Co.*, 720 F.2d 418, 419 (5th Cir. 1983). We evaluate the district court's legal determinations de novo and its factual determinations for clear error. Cf., e.g., *Squires-Allman v. Callahan*, 117 F.3d 918, 920 (5th Cir. 1997) (award of attorneys' fees under the Equal Access to Justice Act).

III.

The government correctly argues—but not entirely for the right reasons-that the district court lacked jurisdiction over the defendant's petition. The government maintains that, absent statutory or constitutional commands, federal courts are powerless to employ the expungement remedy against the executive branch. Because this conflicts with our caselaw—and courts' traditional ability to fashion remedies in the face of rights violations—we disagree.

To have standing, a party claiming expungement of executive branch records must make a showing of more than mere burden. Unlike a person asking for expungement of judicial records-over which the court has supervisory powers[2]—the claimant must show an affirmative rights violation by executive branch officers or agencies to justify the intrusion into the executive's affairs.[3] This injury must be

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[2] Courts have supervisory powers over their own records. In this case, the judicial proceedings have been expunged. That portion of the petition was not challenged in the district court and is not on appeal.

[3] "However broad a federal court's discretion concerning equitable remedies, it is absolutely clear... that in a nondiversity suite a federal court's power to grant even equitable relief depends on the presence of asubstantive right derived from federal law." *Bivens v. Six Unkown Agents*, 403 U.S. 388, 400 (1971) (Harlan, J., concurring in the judgment).

such that no other remedy would afford relief.

The defendant has not asserted any violation of rights by executive branch officers or agencies. For him to have standing,[4] therefore, we would have to find an independent "right to expungement." No court, however, has ever held expungement to be a "right." Rather, courts have used expungement as a remedy for other constitutional statutorily-created rights that have been violated by a state or other governmental agency.

A.

1.

The Seventh Circuit has held that federal courts have no jurisdiction to enter an expungement order against the executive branch: "To obtain expungement of records maintained by the FBI or any other Executive Branch agency, [the claimant] (or anyone else) must go directly to the Executive Branch." *United States v. Janik*, 10 F.3d 470, 473 (7th Cir. 1993). The court found no constitutional basis for granting such relief: "[T]here is nothing in the Constitution that provides jurisdiction to grant or deny motions or expungement. Certainly, the Constitution does not prohibit the government from maintaining what are admittedly accurate records of [the claimant's] indictment and conviction." *Id.* at 471.[5]

The court also held that it lacked a statutory basis for providing the claimant such relief, rejecting the contention that 28 U.S.C. §3231, which grants the federal courts jurisdiction over federal crimes, was

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[4] *See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (outlining the injury requirements for standing under Article III).

[5] In *Janik*, a defendant whose firearms conviction had been overturned petitioned the district court for expungement, claiming that the conviction, even through subsequently set aside, interfered with his advancement in the Army Reserve.

sufficient. Section 3231 "does not vest the federal district courts with authority to invade the Executive Branch of government, in particular the Attorney General and, through her, the FBI. In fact the Attorney General is required by at least one statute, 28.U.S.C. §534, to collect criminal records . . . ." Id. at 471.

2.

Janik elucidates the limits of the expungement remedy. Because it is so intrusive on those agencies that enforce and administer the law, expungement should rarely, if ever, be employed by the courts against executive agencies. The expungement remedy is burdensome on the executive because it imposes a cost-in terms of both money and lost information that could be useful in the future-and it subverts Congress's otherwise express desire to preserve and maintain all criminal records.[7]

Yet, in the end, the *Janik* court went too far, in our view. Essentially, it held that courts are entirely without power to use the expungement remedy against the executive branch until and unless Congress so permits. See *Janik*, 10 F.3d at 471. This conclusion is troublesome for two reasons.

First, courts — not legislatures —have historically crafted remedies when a claimant has demonstrated that his rights have been violated.[8] The classic case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803), is a notable example: "The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws

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[7] *See 28* U.S.C. §534

[8] "The Court today simply recognizes what has long been implicit in our decisions concerning equitable relief and remedies from statutory schemes; i.e., that court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional remedies." *Bivens*, 403 U.S. at 408 n.8 (Harlan, J., concurring in the judgment).

furnish no remedy for the violation of a vested legal right." Id. In the main, courts have not restrained their remedial powers on account of the wrongdoers' affiliation with the executive branch. *See, e.g., Bivens,* 403 U.S. at 395-96; Marbury, 5 U.S. at 163.

More importantly for our purposes, our circuit has employed the expungement remedy before-in the absence of specific congres- sional permission-when no other remedy existed to vindicate important legal rights. For example, in *United States v. McLeod,* 385 F.2d 734, 750 (5th Cir. 1967), we ordered expungement in a civil rights/voting rights case because state officials were intentionally arresting blacks to prevent them from voting. No other remedy presented the court with a way to vindicate the wrongly charged individuals' rights.

3.

The *Janik* court maintained that in the absence of congressional authority, it did not have the right to use the expungement remedy.[9] Because this characterization is overly broad-especially in light of McLeod[10] —we adopt a narrower focus: In order to have standing to seek expungement, the party seeking expungement against executive agencies must assert an affirmative rights violation by the executive actors holding the records of the overturned conviction.

B.

Thus, *McLeod* supports our contention that outside the sphere of the court's own records, the petitioner must assert a specific rights violation-one that cannot be remedied by the relief otherwise provided for by the courts or by Congress-in order to qualify for expungement. In *McLeod,* the wrong was not the independent lack of expungement by the state officials; rather, we used expungement as a remedial measure for the state officers' civil rights violations. *See McLeod,* 385 F.2d at 750. The remedy was a direct and proximate result of those violations. *See also Doe v. Webster,* 606 F.2d

1226, 1231 (D.C. Cir. 1979) (requiring a nexus between the injury and the expungement remedy). In this case, by way of contrast, the only possible rights violation to justify federal jurisdiction would appear to

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[9] Congress has explicitly provided for expungement of executive branch materials in specific cases. For example, Congress has allowed courts to expunge executive branch records under the Controlled Substances Act, 28 U.S.C. § 3607 (c); 21 U.S.C. § 844a (j).

Arguably, under the cannon of *expressio unius exclusio alterius*, because Congress has failed to provide general expungement remedies, we should find that it has intended not to do so for cases that these statues fail to reach. *See, e.g., Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200, 1206 (5th Cir. 1997). By this reasoning, Congress's affirmative grant of an expungement remedy for executive branch materials in some circumstances, but not in others, wipes away any federal common law rights—and remedies—that otherwise may have existed. *Cf.id.* (holding that congressional provision of a specific remedial scheme foreclosed other court-made remedies).

Such an interpretation, however, conflicts with our caselaw in the civil rights area. there, we have used the expungement power to remedy civil rights violations in the absence of a statutory grant of expungement powers. *See McLeod*, 385 F.2d at 750. Although we could find that the subsequent enactment of the expungement remedy in the Controlled Substances Act was an implicit repeal of all other uses of the remedy, the argument is weak. Had Congress wanted to foreclose this remedy—that courts have been employing for years on their own—it logically would have passed a general prohibition of its use.

[10] *McLeod*, was a case ordering state officials to expunge records. Here, the issue concerns Article II actors. We have noted, in *dictum*, one possible distinction between court expungement orders against state officials and those against federal executive actors. *See Scott*, 793 F.2d at 118. Expungement orders against Article II actors could interfere with the pardon power. *See id.* That power, however, should not be read *to prevent* court relief for rights violations. There is no apparent reason why the two powers of the different branches cannot operate contemporaneously—just as judicial review and the pardon power normally do. The pardon-power argument also appears to have no limit. If court-ordered expungement interferes with the pardon power, congressionally approved court expungement—as in the Controlled Substances Act—also should be unconstitutional.

be the violation of the defendant's "right to expungement."

1.

There is no constitutional basis for a "right to expungement." The President, not the district court, runs the executive branch—and it is he who decides how that branch will function. There is no specific exception to this general constitutional rule for expungement. The Due Process Clause, for example, has never been read that broadly. *Cf., e.g., DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). The "inherent equity powers of the court"—with even less textual basis than many due process rights—should require no more..

2.

Furthermore, there is no statutory right to expungement in this case. Where the courts have elsewhere provided for expungement of executive branch records, it has been to remedy statutory rights. For example, courts have ordered expungement of arrest records under the Controlled Substances Act and the Youth Corrections Act. *See 18* U.S.C. §3607(c) (outlining the expungement process under the Controlled Substances Act); *Doe,* 606 F.2d at 1231 (expunging FBI records under the Youth Corrections Act, 18 U.S.C. § 5005).

These court actions came not from a general amorphous right to expunge, but from specific statutory provisions granting a right that could be effected only by the court's use of that remedy: "While the decision to expunge an arrest record depends on the facts and circumstances of the case, there must be a logical relationship between the injury and the requested remedy." *Doe,* 606 F.2d at 1231 (citations omitted). The District of Columbia Circuit has explained Doe thusly: "Our holding in *[Doe]* rested . . . *on a statute providing for expungement* . . . . In ordering the expungement of appellant's conviction for a marijuana offense committed while a minor, the court explicitly did so pursuant to . . . *a federal statute designed to promote the reha-*

bilitation of juvenile offenders." Livingston v. United States Dep't of Justice, 759 F.2d 74, 78 (D.C. Cir. 1985) (emphasis added).

The presence of a statute and the need to give full effect to statutory rights are what gave rise to cases like *Doe.* The court's "general power" to order expungement against executive agencies cannot be exercised at will. Instead, it must be tied to an explicit constitutional or statutorily-created right.

3.

We should not elevate a mere remedy to the status of a right.[11] The fashioning of a remedy should be based on something else. A petitioner cannot come into court to ask for an injunction and have the harm the injunction is based on be the fact that the government officers would not enjoin themselves. Something is missing. That something is injury to a legally protected interest. *See Lujan,* 504 U.S. at 560.

There is no allegation that any governmental agency is using information adversely to the defendant. He does not claim that the government is denying him benefits that an unconvicted person would be entitled to receive; he claims only that the records "interfere" with his career in law enforcement. Although such showings of burden may justify the court's decision to expunge judicial records—or to amend the judgment—we cannot grant expungement relief against the executive without more specificity.

IV.

The defendant also has not met the high standard for invoking the remedy of expungement.[12] This case is indistinguishable from *Rogers,* for granting expungement would give the defendant "more relief than

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[11] Of course, expungement could be a right itself if Congress so provides—as it has done in the Controlled Substances Act. *See 18* U.S.C. § 3607 (c).

[12] In some respects, the jurisdictional issue collapses into the second issue—the showing needed to obtain the expungement remedy. The failure to state a claim deprives the court of jurisdiction under Article III, because there is no case or controversy; it also thereby forecloses the court's ability to grant a remedy.

if he had been acquitted." *Rogers*,[13] 469 F.2d at 1085.

A.

The district court erred in finding this case distinguishable from *Rogers*. There, we held that the petitioner was not entitled to expungement in a case in which his conviction had been overturned because of a Sixth Amendment right-to-counsel violation. *See id.* "Public policy requires here that the retention of records of the arrest and of the subsequent proceedings be left to the discretion of the appropriate authorities. The judicial editing of history is likely to produce a greater harm than that sought to be corrected." *Id.*

In *Scott*, we followed the "clear" jurisprudence of *Rogers:* Since we have determined that a district court lacks power to order the official records of an *overturned* conviction rewritten, it follows as an a *fortiori* matter that the court is not empowered to do so in a case such as this . . . ." *Scott*, 793 F.2d at 118. Other circuits also have narrowly delineated this extreme remedy: [A]n acquittal, standing alone, is not in itself sufficient to warrant an expunction of an arrest record." *United States v. Linn*, 513 F.2d 925, 927-28 (10th Cir. 1975); *accord, e.g., United States v. Schnitzer*, 567 F.2d 536, 539-40 (2d Cir. 1977) (quoting *Linn*).

The overturned conviction in *Rogers* seems indistinguishable from the overturned conviction here. The district court believed, however, that the instant case is distinguishable from our precedent because "[m]ore than being presumed innocent or found innocent of a valid crime, [defendant] was charged with and convicted of crimes which

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[13] There also exists no authority to support the district court's authorization of such an all-encompassing expungement order. The court ordered an expungement of all records of *all executive agencies*. Such an order directly contravenes our holding in *Rogers* that such a remedy, if granted, must be "exceedingly narrow," *Rogers*, 469 F.2d at 1085.

did not exist."

We disagree.[14] If the defendant had been pardoned or acquitted, he would be entitled to be treated as a person who had never been charged.[15] If he were still denied government benefits because he had been charged, he colorably could assert a civil rights challenge-arguing that his right to be free from double jeopardy, or his constitutional right under the pardon power, had been infringed. An overturned conviction should provide similar, not greater, protections.

B.

1.

Even if, arguendo, a defendant whose convictions are over- turned somehow has more rights than one who is declared not guilty, the strong presumption is against expungement. *See, e.g., Rogers,* 469 F.2d at 1085. In the overwhelming majority of cases-those cited by the district court and the government[16]—the court has refused to grant the remedy of expungement.[17] Only a handful have ever actually upheld such relief-and then only limited relief in exceptional circumstances.[18]

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[16] *See United States v. Pinto,* 1 F.3d 1069 (10th Cir. 1993); *Geary v. United States,* 901 F.2d 679 (8th Cir. 1990); *United States v. Friesen,* 853 F.2d 816 (10th Cir. 1988); *Scott,* 793 F.2d at 118; *Allen v. Webster,* 742 F.2d 153 (4th Cir. 1984); *International Harvester,* 720 F.2d at 420; *Diamond v. United States,* 649 F.2d 496 (7th Cir. 1981); *Schnitzer,* 567 F.2d at 539-40; *United States v. Briggs,* 514 F.2d 794 (5th Cir. 1975); *Linn,* 513 F.2d at 927; *United States v. Bohr,* 406 F. Supp. 1218 (E.D. Wis. 1976).

[17] *See Pinto,* 1 F.3d at 1070-71; *Geary,* 901 F.2d at 680; *Friesen,* 853 F.2d at 818; *Scott,* 793 F.2d at 118; *United States v. G.,* 774 F.2d 1392, 1395 (9th Cir. 1985); *Allen,* 742 F.2d at 154-55; *International Harvester,* 720 F.2d at 420; *Schnitzer,* 567 F.2d at 539-40; *Carter v. Hardy,* 543 F.2d 555 (5th Cir. 1976); *United States v. McMains,* 540 F.2d 387, 389 (8th Cir. 1976); *Linn,* 513 F.2d at 927; *Rogers,* 469 F.2d at 1085; *United States v. Seasholtz,* 376 F. Supp. 1288, 1290 (N.D. Okla. 1974).

[18] *See Menard v. Mitchell,* 430 F.2d 486, 490-91 (D.C. Cir. 1970) (Fourth Amendment violation); *McLeod,* 385 F.3d at 350 (civil rights remedy); *Bohr,* 406 F. Supp. at 1219-20 (motion unopposed by U.S. Attorney); *Kowall v. United States,* 53 F.R.D. 211, 215-16 (W.D. Mich. 1971).

None of the cases cited supports the proposition that the harm the defendant alleges justifies the extraordinary remedy of expungement. For example, in *United States v. Friesen,* 853 F.2d 816 (10th Cir. 1988), the court reversed the expungement order in a situation similar to the one presented here. There, a jury had acquitted Friesen, an attorney, of conspiracy to manufacture and distribute cocaine in violation of federal law. Friesen argued that he "'is currently being grievously injured because by the retention of the . . . records . . . [he] is being damaged in terms of employment availability, reputation in the community, and possible denial of professional licensing.'" *Id.* at 816. The court found that the district court's order expunging the prosecu- tion's records on this showing alone constituted an abuse of discretion.

We have similarly held that granting expungement of executive branch records on the facts alleged in Friesen would constitute an abuse of discretion. In Rogers, a defendant whose conviction had been overturned had suffered tangible harm: He had been forced to tender his resignation from the school board as a result of his conviction. In Scott, the petitioner complained that the records of her past convictions interfered with her job as a securities dealer. Notwithstanding these showings of harm, we vacated both expungement orders. *See Scott,* 793 F.2d at 118; *Rogers,* 469 F.2d at 1085.

2.

The defendant asserts that the government has made no showing to justify not expunging. He improperly places the burden on the government. Instead, he must demonstrate that there is likely no other remedy that can relieve his injury.

Expungement is "exceedingly narrow" and is granted only in exceptional circumstances. *Rogers,* 469 F.2d at 1085; *accord, e.g., Geary v. United States,* 901 F.2d 679, 680 (8th Cir. 1990) (citing cases). The district court's reasoning is based on the fact that the government failed to provide a strong enough justification for not expung-

ing. The government's interests here, however, are presumed, unless the petitioner can overcome them. *See Rogers,* 469 F.2d at 1085 (holding, without discussing the government's interests, that the petitioner had failed to meet his burden).

The defendant has not made an adequate showing of harm. He claims that he is having a hard time getting a job in law enforcement because he was convicted of conspiracy and fraud when he was an official of a sheriff's office. Assuming, without deciding, that such discrimination is unlawful, he has made no showing why he cannot seek a narrower remedy against the unknown and unnamed officers or agencies who are discriminating against him.

3.

The government has weighty interests in keeping its records unredacted. Congress has mandated that the Attorney General "acquire, collect, classify, and preserve" all records concerning a crime. 28 U.S.C. § 534(a). Moreover, there is a valid law enforcement need: The information may assist in further investigation of the conspiracy or related crimes.

The government cannot and should not be forced to rewrite history whenever the inclination strikes a defendant whose conviction is subsequently overturned. *See Rogers,* 469 F.2d at 1085. In the absence of any showing of an agency's or official's affirmative misuse of the subject information, the government's interests outweigh the defendant's. Therefore, the decision to

order expungement in executive branch records was necessarily an abuse of discretion.

REVERSED.

APPENDIX D

The Privacy Act

1. Introduction

1.1 The Privacy Act of 1972, P.L. 93-579, 88 Stat.1896, became effective on September 27, 1975. The Act is codified at 5 U.S.C. Sec. 552a (not to be confused with the first subsection of the FOIA, which is 5 U.S.C. 552(a)).

1.2 The Congressional findings in support of the Act, set forth in full here, indicate the breadth of Congressional purpose:

1.2.1 "The privacy of an individual is directly affected by thecollection, maintenance, use and dissemination of information by Federal agencies;

1.2.2 "The increasing use of computers and sophisticated information technology, while essential to the efficient operations of the Government, has greatly magnified the harm to individual privacy that can occur from any collection, maintenance, use or dissemination of personal information;

1.2.3 "The opportunities for an individual to secure employment, insurance, and credit, and his right to due process, and other legal protections are endangered by the misuse of certain information systems;

1.2.4 "The right to privacy is a personal and fundamental right protected by the Constitution of the United States; and

1.2.5 "In order to protect the privacy of individuals identified ininformation systems maintained by General agencies, it isnecessary and proper for the Congress to regulate the collection, maintenance, use and dissemination of information by such agencies."

1.3 To accomplish those purposes, the Act provides:

1.3.1 Restrictions on disclosure, and redisclosure, of personally identifiable records;

1.3.2 "Fair information practices" which require affected agencies to comply with statutory norms for the collection, maintenance, anddissemination of records;

1.3.3 A system for access by individuals to records about themselves, with exceptions;

1.3.4 A use for amendment of records about individual upon a showing that they are not accurate, relevant, timely, or complete;

1.3.5 Limitations upon the use of Social Security Numbers for identification; and

1.3.6 Authorization for a Privacy Protection Study Commission to study the problems addressed by the act and to make recommendations.